No. 89-811

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARVIN NEIMAN, d/b/a/ CONCOURSE NURSING HOME, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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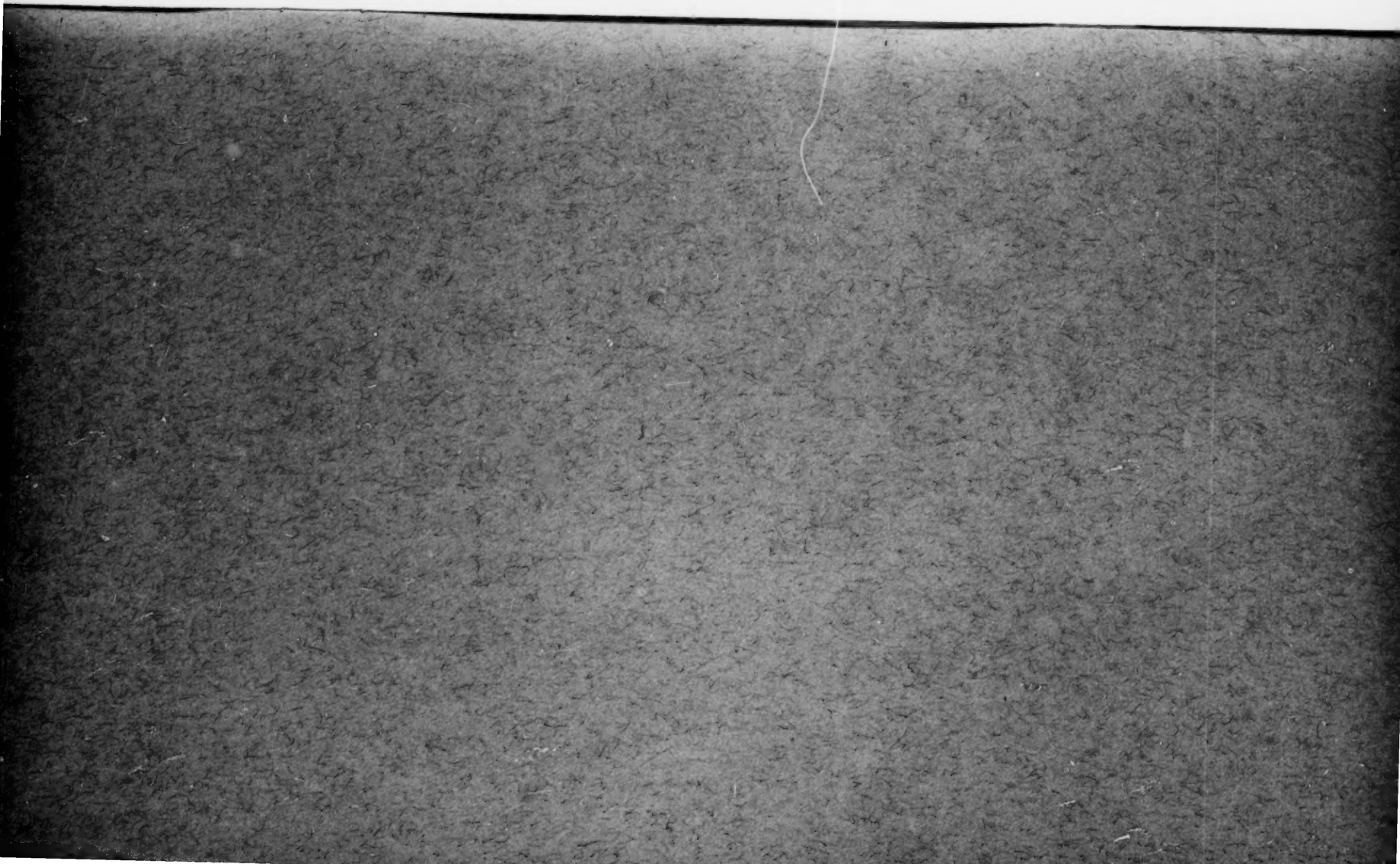

QUESTION PRESENTED

Whether the district court erred in holding that it lacked jurisdiction to consider petitioner's allegation that the Medicare fiscal intermediary improperly failed to consider petitioner's claims for reimbursement under Part B of the Medicare Act.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A22-A23) is unpublished, but the decision is noted at 888 F.2d 126 (table). The orders of the district court (Pet. App. A1-A8, A9-A20) are reported at 722 F. Supp. 950 and 722 F. Supp. 954.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1989. The petition for a writ of certiorari was filed on November 15, 1989. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. Medicare Part B is a voluntary supplemental insurance program that provides reimbursement for certain physician and related ancillary services. 42 U.S.C. 1395k (1982 & Supp. V 1987). Private insurance carriers administer Part B benefits under contracts with the Secretary of Health and Human Services (HHS). 42 U.S.C. 1395u(a)(1); *United States* v. *Erika, Inc.*, 456 U.S. 201, 202-204 (1982); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 674-675 (1986). The carrier reimburses Medicare patients, or their providers as assignees, for 80% of the "reasonable charges" for services as determined by the carrier in accordance with the Medicare statute and regulations promulgated by the Secretary. 42 U.S.C. 1395j-1395w (1982 & Supp. V 1987).

In order to be eligible for payment, either the beneficiary or the institution that provided the medical services to the beneficiary (the provider) must submit a timely claim to the carrier. 42 C.F.R. 405.250 (1986). Providers must furnish all necessary information to the carrier to allow the carrier to determine reimbursement. 42 C.F.R. 405.252(a) (1986). If the carrier denies a claim, the provider may request review from the carrier within six months of the denial. 42 C.F.R. 405.807, 405.810. See *Erika*, 456 U.S. at 203. If the carrier denies the claim after this review, the provider may within six months request an oral hearing if the amount in con-

troversy exceeds $100. 42 C.F.R. 405.820. See *Erika*, 456 U.S. at 203. In addition, if the carrier fails to act on an initial claim within 60 days of its receipt, the provider may request initial determination of the claim at an oral hearing. 42 C.F.R. 405.801 (a) and (b), 405.803(a), 405.820(d). During the time period relevant to this dispute, the Act did not provide for administrative review by the Secretary or for judicial review of the carrier's final determination whether a particular claim was covered by Part B or of the amount of reimbursement due under Part B. 42 U.S.C. 1395ff, 1395ii; *Erika*, 456 U.S. at 206-211.[1]

2. Petitioner is the sole owner and operator of a skilled nursing facility. Respondent Travelers Insurance Company acted as the carrier for petitioner's Medicare claims. Pet. App. A1. For the years 1976 to 1979, petitioner submitted to the carrier a number of claims for Medicare reimbursement under both Parts A and B. *Id.* at A9. In count six of his complaint (the only claim on which petitioner seeks review in this Court), petitioner alleged that the carrier "intentionally, maliciously, and wantonly" refused to process 2200 bills submitted by petitioner for reimbursement under Part B for physical and speech therapy services provided to over four hundred patients in petitioner's nursing facility (Pet.

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[1] In 1986, Congress amended 42 U.S.C. 1395ff(b) (Supp. V 1987) to permit judicial review of Part B benefit amount determinations where the amount in controversy is $1000 or more. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Tit. IX, § 9341(a), 100 Stat. 2037-2038. However, those amendments apply only to services furnished on or after January 1, 1987. § 9341(b), 100 Stat. 2038. Because the services at issue in the instant case were rendered prior to that date, the 1986 amendments do not apply here.

App. A2-A3; Gov't C.A. Br. 17). The Secretary, on behalf of himself and the carrier, responded to these allegations, *inter alia*, by arguing that, in accordance with this Court's decision in *Erika*, the district court lacked jurisdiction to review these claims. Gov't C.A. Br. 20-27. With regard to the 2200 bills allegedly not processed, the Secretary also asserted, based on the documentation that petitioner provided, that the allegations were frivolous on their face. The Secretary pointed to evidence that the carrier had reviewed and either approved or denied bills submitted on 343 patients, and had determined that another set of bills lacked the proper documentation needed for processing. With regard to the remaining group of allegedly unprocessed bills representing claims on 33 patients, the Secretary explained that petitioner had failed to exhaust administrative remedies in that he had not requested a hearing within 60 days of submission of the bills to complain of failure to process. See Gov't C.A. Br. at 17-19. See also p.3, *supra* (regulations governing appeals to carrier for failure to process claims).

3. The district court dismissed count six for lack of jurisdiction (Pet. App. A1-A8). The court relied on the distinction recognized by this Court in *United States* v. *Erika*, *supra*, and *Bowen* v. *Michigan Academy*, *supra*, between a claim "merely that the insurance carrier misapplied or misinterpreted valid rules and regulations," which is unreviewable, and "a challenge to the validity of an agency rule or regulations," over which federal courts have jurisdiction. Pet. App. A3 (quoting *Kuritzky* v. *Blue Shield of Western New York, Inc.*, 850 F.2d 126, 128 (2d Cir. 1988), cert. denied, 109 S. Ct. 787 (1989)). The court concluded that petitioner "cannot escape the

reach of *Erika* by characterizing the action against Travelers as an '*ultra vires*' claim." *Ibid.* It observed that petitioner was not seeking "to invalidate the methods by which carriers review and process claims," Pet. App. A4, "but had alleged only that the carrier "failed to follow the proper procedures and thereby deprived him of amounts legally reimbursable." *Ibid.* The court concluded that "[t]his is precisely the type of matter which is left to review by the carrier in a 'fair hearing' conducted pursuant to § 1395u(b)(3)(C), *see Michigan Academy, supra*, 476 U.S. at 678, and which is precluded from review by *Erika, supra*." Pet. App. A4.

The court also rejected petitioner's theory that, by allegedly denying him due process of law, the carrier's actions could be challenged as a constitutional tort under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court relied on *Schweiker* v. *Chilicky*, 108 S. Ct. 2460 (1988), in which this Court held that no *Bivens* remedy was available for actions based on claims for benefits under the social security disability program, because Congress has already created an elaborate system for review of those claims. The district court concluded that a *Bivens* remedy likewise is unavailable here, where "Congress ha[s] similarly created an elaborate and comprehensive scheme for health care providers" to obtain review of claims for reimbursement under Part B. Pet. App. A6. The court of appeals affirmed without an opinion, "for substantially the reasons stated by the district court" (Pet. App. A23).

ARGUMENT

The unpublished order of the court of appeals affirming the decision of the district court correctly applies this Court's rulings regarding review of Medicare Part B claims and does not conflict with any decision of another court of appeals. The issue presented here is also of little continuing importance in light of Congress's intervening amendment of 42 U.S.C. 1395ff to permit judicial review of benefit amount determinations under Part B of Medicare. This Court has recently denied review in three other cases raising similar issues of the reviewability of Part B claims, see *Texas Medical Ass'n* v. *Sullivan*, 875 F.2d 1160 (5th Cir.), cert. denied, 110 S. Ct. 573 (1989); *Kuritzky* v. *Blue Shield of Western New York, Inc.*, 850 F.2d 126, 128 (2d Cir. 1988), cert. denied, 109 S. Ct. 787 (1989); *Association of Seat Lift Manufacturers* v. *Bowen*, 858 F.2d 308 (6th Cir. 1988), cert. denied, 109 S. Ct. 1528 (1989). There is no reason for a different disposition here.

1. a. In *United States* v. *Erika*, *supra*, this Court held that 42 U.S.C. 1395ff precludes judicial review of Part B reimbursement determinations. *Michigan Academy*, 476 U.S. at 674-678, carves out an exception to that rule for direct challenges to the Secretary's regulations and directives that prescribe the method to be used by the carrier in making reimbursement determinations and calculating Part B benefits. As the *Michigan Academy* Court explained, 476 U.S. at 677-678, such methods bind the carrier hearing officer; therefore their legality cannot be considered in a carrier hearing. The district court correctly applied these principles to the particular circumstances of this case.

Petitioner seeks to evade the distinction between a misapplication by the carrier of the Secretary's reg-

ulations, and a challenge to those regulations themselves, by complaining that the carrier's deliberate refusal to process or review his claims has effectively denied him the administrative process prescribed by Congress. Petitioner argues that when a carrier refuses to process claims, there is, by definition, no "fair hearing" or any other action by the carrier on the claims. Thus, petitioner asserts, an action based on the contention that a carrier has refused to process claims cannot possibly be a "matter[] which Congress * * * [left] to be determined in a fair hearing conducted by the carrier." *Michigan Academy*, 476 U.S. at 678.

The courts below were correct to reject petitioner's novel theory. At bottom, petitioner's dispute is not with the Secretary's regulations but only with the actions of the carrier in applying those regulations to the handling of petitioner's claims. As such, it falls squarely within *Erika*'s proscription rather than *Michigan Academy*'s exception. Even assuming arguendo the truth of petitioner's allegations that the carrier wantonly refused to process his claims or his appeals—allegations conclusively refuted by the Secretary in the district court—his charge still amounts to nothing more than a claim that the carrier misapplied the procedures prescribed by the Secretary for processing and reviewing Medicare Part B claims. For the purpose of applying the distinction established in *Erika* and *Michigan Academy*, an allegation that the carrier has failed to process a claim is no different from any other assertion that the carrier did not properly follow the Secretary's procedural regulations in some particular manner. Nor is it appreciably different from a routine claim that the carrier erred in applying the Secretary's substantive regulations on such questions as the calculation of the

reasonable fee for services, or whether services are covered or medically necessary. In all these situations, whether procedural or substantive, the carrier can be wrong, even patently and egregiously wrong. However, so long as the claimant is not asserting the illegality of the Secretary's regulations or procedures themselves, Congress has determined that the carrier has the last word, and the courts are without authority to intervene.

b. At any rate, the issue concerning the precise dividing line between claims that are precluded by *Erika* and those that are allowed by *Michigan Academy* is of little continuing importance since Congress has amended 42 U.S.C. 1395ff to permit judicial review of benefit amount determinations under Part B where the aggregate amount in controversy is $1000 or more. This new provision means that in the future, if any provider wishes to assert that the carrier refused to process his claims for reimbursement or to hear his appeal, he can proceed to the district court.[2] Moreover, even with regard to still-pending claims for services provided prior to January 1, 1987, this case is too unimportant to warrant this Court's attention. Petitioner has not cited any prior reported case in which a provider or a beneficiary

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[2] Although the amended Section 1395ff allows district court review of a decision to deny a claim only after a hearing, any future provider who alleges that he was wrongfully denied a hearing will be able to allege and prove that the carrier failed to provide him with the required hearing even though he took all necessary steps to request a hearing, either after an initial denial and the carrier's decision to uphold the denial after review, or after the provider requested an oral hearing when the carrier failed to act on his claim within 60 days. If the district court agrees with such an allegation, it presumably will remand the claim to the carrier for the required hearing.

alleged that the carrier had failed to process his claim or his appeal, and we are aware of no such prior or pending cases. There is thus no reason for this Court to decide whether judicial review of this peculiar type of claim is precluded.

2. Petitioner also alleges that because his claim is based in part on denial of due process, the district court had jurisdiction over his claim that the carrier committed a constitutional tort under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court rejected this contention, relying on *Schweiker* v. *Chilicky*, 108 S. Ct. 2460 (1988). There, this Court held that a *Bivens* remedy was not available for actions based on claims for benefits under the social security disability program, because Congress has already created an elaborate system for review of those claims. The statutory provisions and the Secretary's regulations similarly establish elaborate procedures for processing Part B claims and appealing their denial—procedures that this Court held in *Erika* were intended by Congress to be exclusive. As this Court explained in *Chilicky* and in *Bush* v. *Lucas*, 462 U.S. 367 (1983), courts should not create a new remedy of constitutional dimension when Congress has already created a remedy that it deems adequate. Allowing a *Bivens* remedy for an alleged procedural violation involving a Part B claim would undermine Congress's decision to provide a comprehensive administrative scheme for handling these claims.

Petitioner's allegation that the carrier here "frustrated" the application of the Part B administrative scheme is similarly unavailing. The inquiry under *Bush* and *Chilicky* is not over whether the plaintiff actually received relief under the alternative remedy, but whether it is appropriate for the courts to create

a new type of remedy when Congress already provided an adequate one through a comprehensive administrative scheme.[3] Petitioner's allegation that the available remedy in the instant case was not actually provided to him is not a challenge to the adequacy of the administrative remedy prescribed by Congress, but only a challenge to the application of the remedial procedures in his own case.[4]

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[3] Petitioner cites (Pet. 6 n.1) a decision of the Federal Circuit (not the D.C. Circuit, as he contends) holding that *Chilicky* does not apply where the defendant has "frustrated" the alternative avenue of relief. *Ysasi* v. *Rivkind*, 856 F.2d 1520, 1528 (Fed. Cir. 1988). In that case, however, the plaintiff alleged that a Border Patrol agent frustrated his ability administratively to challenge the seizure of his truck by turning the truck over to the finance agency, which apparently mooted the administrative appeal. In the present case, in contrast, petitioner simply asserts that the carrier failed to provide him with the process required by regulation—that is, that the body charged with providing the remedy created by Congress erred in carrying out its duty with regard to petitioner's claims.

[4] At any rate, the amendment of Section 1395ff to provide judicial review of Part B claims for services provided after January 1, 1987, means that the question of the availability of a *Bivens* remedy for Part B claims in the absence of direct judicial review, like the statutory issue, has little prospective importance.

In footnotes, petitioner raises two other grounds for jurisdiction. First, he mentions mandamus as a possible means to avoid the preclusion of review in 42 U.S.C. 1395ff, and 1395ii (which provides that judicial review of Medicare Act claims shall be limited in accordance with the terms of 42 U.S.C. 405(h)) (Pet. 6 n.2). This Court has not definitively addressed, in the wake of *Michigan Academy*, whether mandamus jurisdiction might be available over actions such as petitioner's involving Medicare Part B claims. However, there is no reason for the Court to consider the issue here,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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where the possibility is only casually invoked by petitioner in his petition, and apparently was neither presented nor argued to the district court or the court of appeals. See Plaintiff-Appellant C.A. Br.

Petitioner also cites diversity jurisdiction (Pet. 7 n.3) as a possible basis for federal judicial review. First of all, there is a serious question whether the parties here could satisfy the requirement of diversity, since the carrier is not a proper defendant in its own right but stands in the shoes of the Secretary. See *Erika*, 456 U.S. at 206 n.4; *Anderson* v. *Occidental Life Insurance Co.*, 727 F.2d 855, 856 (9th Cir. 1984); *Peterson* v. *Weinberger*, 508 F.2d 45, 50-52 (5th Cir.), cert. denied, 423 U.S. 830 (1975). In any event, the Act's carefully drawn provisions, which the Court in *Erika*, 456 U.S. at 206-211, held evince a clear congressional intent to bar judicial review of the carrier's determination of the amount of benefits payable under Part B, equally preclude diversity as well as federal question jurisdiction.

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